

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH M. BORJAS SR.
Claimant

VS.

OPTIMUS CORP.
Respondent

AND

COMMERCE & INDUSTRY INS. CO.
GLOBE INDEMNITY CO.
SECURITY INS. CO. OF HARTFORD
FIRST LIBERTY INSURANCE CORP.
LIBERTY MUTUAL INS. CO.
Insurance Carriers

Docket No. **1,029,233**

ORDER

Respondent and its insurance carrier, Liberty Mutual Insurance Co., request review of the April 26, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant filed an application for hearing on June 2, 2006, alleging injuries to his bilateral lower extremities and back on or about June 2005 and each day worked thereafter. Respondent admitted claimant suffered injury to his left knee and provided treatment for that extremity. However, it was denied claimant had injured his right knee. Consequently, Dr. Pat Do performed an independent medical examination of claimant and opined the claimant's right knee problems were the natural and probable consequence of an injury claimant had suffered in August 2001. On January 17, 2007, claimant filed an amended application for hearing alleging injuries to his bilateral lower extremities and back commencing on or about August 13, 2001 and each day worked through his last day worked.

As previously noted, respondent had not disputed claimant's left knee injury and during the treatment for that injury claimant received not only a left knee replacement but also a right knee replacement. Apparently, the treating physician was unaware that he had only been authorized to treat claimant's left knee.

The matter then proceeded to preliminary hearing on claimant's request for payment for the right knee replacement surgery as well a request for treatment for his back. The primary contention of claimant was that his right knee treatment should be authorized and the medical bills incurred should be paid.

The Administrative Law Judge (ALJ) found claimant's left knee and back problems were compensable. But the ALJ further determined the claimant failed to file a timely written claim for his right knee injury.

Respondent and Liberty Mutual (Liberty) request review of whether claimant met his burden of proof to establish that he suffered a work-related back injury. Respondent argues claimant injured his back in 1968 and has been symptomatic since that injury. Consequently, respondent argues that his current back complaints are the natural and probable consequence of that injury.

Commerce and Industry deny claimant's accidental injury arose out of and in the course of employment during their coverage period as well as timely notice and written claim.

Globe Indemnity & Security Ins. deny compensability. The statute of limitations for filing an application for hearing regarding an injury that occurred on August 13, 2001, and last payment of medical treatment on November 6, 2001, have expired. The application for hearings have been filed out of time and therefore the claim should be barred. Globe and Security further argue that the medical evidence supports a new injury.

Claimant argues the ALJ's Order should be affirmed as to the left knee and back. But claimant further argues that the evidence supports claimant's contention that he suffered repetitive bilateral knee as well as back injuries after June 2005. Consequently, claimant requests the Board to find he also suffered a compensable injury to his right knee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, Liberty contends that the sole issue for Board determination is whether the ALJ erred in determining claimant had met his burden of proof to establish he suffered a back injury. Liberty further argues the issues regarding claimant's right knee were not

appealed. This Board Member disagrees. K.S.A. 44-551(i)(1) allows appeals from all final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by ALJs upon appeal to the Board, with the request required to be filed within ten days. There is no obligation under the Workers Compensation Act for a cross appeal to be filed. The Board's review is de novo on the record and, once an appeal is filed by any party, the Board has the authority to decide any and all issues pertaining to the case presented to the ALJ, whether they were listed in the application for review or not. Moreover, Liberty was apprised of this issue by claimant's brief and had the opportunity to respond in writing. It cannot be said Liberty's due process rights were infringed upon by this procedure. Again, the Board has de novo review and may consider any and all issues that were before the ALJ.

Joseph Borjas worked almost 40 years for the respondent. His most recent job was a heavy duty crane operator at the time he was laid off. Claimant had to climb a ladder in order to get into the cab of the crane. He also had to grease the mechanisms every 40 hours of usage. Claimant testified he had to climb 10-15 feet on a little ladder to grease the controls and then climb another 6-7 feet in order to grease the platform. Respondent accommodated the claimant by using a man lift to get him above the crane's cab to a walk way. But that lift was not always available and claimant then had to use ladders.

Claimant injured his right knee on August 13, 2001, when he stepped into a pothole and twisted his right knee. The claimant sought medical treatment and continued working. Dr. Zafuta recommended surgery on the right knee but claimant declined and wanted a second opinion which was not obtained. The claimant stated that his knee continued hurting and the condition of his right knee did not change from the August 2001 through his last day worked for respondent in September 2006. But he noted that by September 2006 he could only walk about 20 feet before he would have to bend over and stretch the muscles in his right leg. And he later qualified that statement that the condition in his knee remained the same by noting that his knee pain worsened while climbing ladders at work.

Claimant testified:

Q. Okay, in 2006 when you saw Dr. Hood he was talking about doing both knee replacements, is that right?

A. Yes, sir.

Q. And climbing up the ladder as you described made the right knee pain worse at that point?

A. It didn't help it. It made it a lot worse.

Q. Okay, would it be safe to say your condition from 2001 to 2006 became more painful in your right knee?

A. Yes, sir.

Q. In addition to climbing up the ladders like we have talked about you also had to walk approximately 600 feet between buildings, is that correct?

A. Yes, sir.

Q. Would you have to go back and forth between the buildings more than once per day?

A. Early in the morning to take my supply list and then wait about two hours and go back and get the supplies with a dolly and then that's about twice a day.

Q. Twice a day that you did that?

A. Um-hum.

Q. Was that on, what kind of surface did you have to walk-on?

A. Rocks.¹

Claimant further testified that walking has caused pain in his right knee since 2001 and his left knee since 2006.

Claimant injured his left knee in April 2006 and from that point until he left work for respondent that condition did not change as he continued working. But again the claimant qualified that testimony by stating that climbing ladders and walking at work caused the knee pain to increase.

In 1968 claimant injured his back while working for the respondent. He crushed two vertebrae in his back when he was carrying an 80-pound bag. Claimant sought medical treatment on his own with a chiropractor and continues to see this doctor. Likewise, the claimant noted that his back condition did not change after he injured his knees in 2001 and 2006.

On August 2, 2006, the ALJ ordered an independent medical examination by Dr. Pat D. Do to determine whether or not claimant's right knee complaints are a direct and natural consequence of the original injury which occurred on August 13, 2001. Dr. Do performed a physical examination and recommended corticosteroid injection, consideration of viscous supplementation, and if these conservative measures fail, the claimant is a likely candidate for a total right joint knee replacement. At the time of Dr. Do's evaluation, the claimant was not at maximum medical improvement and the doctor placed temporary restrictions on the claimant of limited kneeling, squatting, crawling, use of stairs, ladders

¹ P.H. Trans. at 43-44.

and extended time on his feet of no more than one hour consecutively with adequate rest in between. Dr. Do then, by letter dated October 4, 2006, opined that claimant's right knee problems were the natural and probable consequence of an injury claimant had suffered in August 2001.

Conversely, in a report dated September 8, 2006, Dr. Edward J. Prostic opined that as a result of his job activities from June 2005 and thereafter claimant aggravated his back and knees in falls. Dr. Prostic further opined that claimant additionally aggravated his knees climbing onto and off cranes in the course of his employment.

Dr. Paul S. Stein examined claimant on March 16, 2006, and concluded that claimant's main problems were his knees and determined claimant did not need further treatment for his back.

On October 2, 2006, claimant had bilateral knee replacement surgery performed by Dr. Hood.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.² The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.³

The claimant suffered a right knee injury in August of 2001, received treatment and continued working. The ALJ correctly determined claimant did not file a timely written claim for that injury. And although claimant initially testified that his right knee condition remained the same he qualified that by noting that as he climbed ladders the condition worsened. Dr. Prostic opined that claimant's work activities after June 2005 aggravated his knee condition both in subsequent falls as well as climbing ladders. It is interesting to note that Dr. Do imposed restrictions against claimant climbing ladders but then concluded his right knee problem was a natural and probable consequence of the fall at work in 2001.

This Board Member concludes that in this case the opinion of Dr. Prostic is more persuasive and establishes that as claimant performed his work activities for respondent each and every day worked after June 2005 he aggravated his preexisting right knee condition. Consequently, the ALJ's Order is modified to find claimant has met his burden of proof to establish that he suffered repetitive trauma to his right knee which aggravated his preexisting right knee condition as he performed his work activities for respondent.

² *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

The claimant testified that he injured his back in 1968 and has received chiropractic treatment for that condition as often as three times a week up to the time of the preliminary hearing. He offered no other explanation for his back complaints and the description of his work did not detail repetitive lifting, bending or twisting activities affecting the back. Dr. Stein concluded claimant did not need treatment for his back complaints. Based upon the record compiled to date this Board Member concludes claimant has not met his burden of proof to establish he suffered a back injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated April 26, 2007, is modified to find claimant suffered a work-related injury to his right knee but did not meet his burden of proof that he suffered a back injury. As the knee injuries occurred during the coverage provided by Liberty the medical expenses for the right knee is assessed against that insurance carrier.

IT IS SO ORDERED.

Dated this 31st day of July 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
James P. Wolf, Attorney for Respondent and Liberty Mutual
Joseph C. McMillan, Attorney for Respondent and Globe Indemnity & Security Ins.
Jon E. Newman, Attorney for Respondent and Commerce & Industry
Thomas Klein, Administrative Law Judge

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2006 Supp. 44-555c(k).